

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

DANIEL WAYNE WALKER #1682175 §
VS. § CIVIL ACTION NO. 6:11cv240
JOHN JARVIS, ET AL. §

ORDER OF DISMISSAL

The above-entitled and numbered civil action was heretofore referred to United States Magistrate Judge Judith K. Guthrie. The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, concludes that this civil rights action should be dismissed pursuant to 28 U.S.C. § 1915A(b)(1) as frivolous and for failure to state a claim upon which relief may be granted. The Plaintiff has filed objections. In the objections, he essentially re-addresses the same points he raised in his complaint.

Plaintiff first contends that as an *in forma pauperis* litigant, he is entitled to having his complaint and summonses served by the United States Marshals Service. He is correct. He also complains that the Magistrate Judge has not caused service to occur. He is correct again, and no such service would be ordered until the preliminary review of a case has been conducted. Here, the Magistrate Judge's preliminary review resulted in the determination that Plaintiff's action should be dismissed as frivolous, which obviates the necessity of serving the complaint and summonses.

Plaintiff contends also that his attorney has somehow acted improperly, apparently by "fil[ing] his own court report," Objections at 4, and has offered several exhibits including copies of

his indictment, arraignment, judgment of conviction and the dismissal of one of the charges against him in the 7th Judicial District Court of Smith County, Texas, in case no. 007-1330-10. *See generally* Exhibits to Objections. The dismissal in case no. 007-1330-10 was specifically noted by the Magistrate Judge in her Report and Recommendation. None of these documents appear to support the claims in Plaintiff's complaint that his attorney and certain assistant district attorneys falsified documents or knowingly used allegedly falsified documents to obtain his conviction. Plaintiff also seems to suggest in his objections that some of the time he spent detained in jail while awaiting charges was not properly credited under Texas Code of Criminal Procedure art. 42.03. However, that claim is not contained in his complaint and will not be considered now.

At bottom, Plaintiff's objections appear to amount to his disagreement with the holding in *Heck v. Humphrey*, 512 U.S. 477, 486-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). However, as the Magistrate Judge observed, Plaintiff's complaint is simply an attack on the validity of his conviction through his civil rights lawsuit seeking damages for the allegedly unlawful actions of counsel and the supervising entities named in the lawsuit. That is precisely what *Heck* prevents, as much as Plaintiff disagrees with it. The proper recourse in this situation is to seek a proper avenue to overturn the conviction, such as by a petition for writ of habeas corpus. The Court notes that Plaintiff included a copy of an order issued by the 7th District Court of Smith County on his prior state application for habeas corpus. *See* Exhibit G to Objections. However, he has not exhausted the avenue of a federal habeas petition. In sum, Plaintiff's objections lack merit.

The Court has conducted a careful *de novo* review of the pleadings and testimony in this case, the Report of the Magistrate Judge, the Plaintiff's objections thereto, and all other pleadings, documents, and records in the case. Upon such *de novo* review, the Court has concluded that the

Report of the Magistrate Judge is correct and that the Plaintiff's objections are without merit. It is accordingly

ORDERED that the Plaintiff's objections are **OVERRULED** and the Report of the Magistrate Judge is **ADOPTED** as the opinion of the District Court. It is further

ORDERED that the above-styled civil case be and hereby is **DISMISSED WITH PREJUDICE** pursuant to 28 U.S.C. § 1915A(b)(1) as frivolous and for failure to state a claim upon which relief may be granted. It is further

ORDERED that any and all motions which may be pending in this civil action are hereby **DENIED**. Finally, it is

ORDERED that the Clerk shall provide a copy of this opinion to the Administrator of the Three-Strikes List for the Eastern District of Texas.

So ORDERED and SIGNED this 23rd day of June, 2011.

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**